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ATTORNEY FOR APPELLANT:

PETER L. BOYLES
Martz & Boyles
Valparaiso, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MARA McCABE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN BICKERSTAFF,
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 64A05-0607-CR-392

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable R.V. Bradford, Judge
Cause No. 64D01-0502-FB-1382

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Nathan Bickerstaff appeals from the sentence imposed by the trial court following his guilty plea to Burglary,¹ a class B felony, and Burglary,² a class C felony. Specifically, Bickerstaff argues that the Porter County trial court erred in ordering his sentence to be served consecutively to Bickerstaff's sentences for separate offenses in Lake and Jasper Counties. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On August 31, 2004, Bickerstaff and James Tabler broke into the home of Terry Hayes in Porter County. Bickerstaff entered the residence through an unlocked back door and removed a safe and a container of coins from the master bedroom. Upon returning to Bickerstaff's home, the men opened the safe and removed \$11,000 and some firearms. On September 21, 2004, Bickerstaff broke into a structure belonging to Komark Ltd., and stole various items.

During the same period of time, Bickerstaff committed a series of burglaries in Lake and Jasper Counties. On a timeline not revealed by the record, Bickerstaff was charged and convicted in those counties and began to serve his sentences therein.

On February 16, 2005, while Bickerstaff was serving his sentences in Lake and/or Jasper Counties, the State charged him with six counts of burglary for a number of instances in Porter County including those involving Hayes's home and Komark's property. On April

¹ Ind. Code § 35-43-2-1.

² Id.

10, 2006, Bickerstaff and the State entered into a plea agreement, pursuant to which Bickerstaff agreed to plead guilty to class B felony burglary for the incident involving Hayes's home and to class C felony burglary for the incident involving Komark Ltd. In exchange for Bickerstaff's plea, the State agreed to dismiss the remaining counts. Additionally, the State agreed that the executed portion of Bickerstaff's sentence would be capped at ten years and that the sentences for these two convictions would run concurrently to one another.

On June 19, 2006, Bickerstaff had just been released from the Department of Correction after serving the sentences for burglary in Lake and Jasper Counties. He had completed the incarceration portion of those sentences and was on parole at that time. The trial court in this matter held a sentencing hearing on June 19, 2006, at which time it sentenced Bickerstaff to ten years of incarceration with two years suspended for class B felony burglary and to four years executed for class C felony burglary. In accordance with the plea agreement, the trial court ordered the sentences to be served concurrently, for a total executed sentence of eight years. The trial court then ordered the executed eight-year sentence to be served consecutively to the sentences in Lake and Jasper Counties.³ Bickerstaff now appeals.

³ The sentence imposed by the Lake County trial court was ordered to run consecutively to the sentence imposed for the charges herein and to the sentence imposed in Jasper County. The sentence imposed by the Jasper County trial court was ordered to run concurrently with the Lake County sentence.

DISCUSSION AND DECISION

As we consider Bickerstaff's argument that the trial court erred in ordering his sentence herein to be served consecutively to the Lake and Jasper County sentences, we observe that sentencing determinations are within the discretion of the trial court. Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. Indiana Code section 35-50-1-2(c) provides that in determining whether a defendant's sentences are to be served consecutively or concurrently, the trial court may consider aggravating and mitigating circumstances. Our Supreme Court has heightened the statutory requirement, mandating that a trial court find at least one aggravating circumstance to support an order of consecutive sentences. Ortiz v. State, 766 N.E.2d 370, 377 (Ind. 2002).

Moreover, where, as here, the consecutive sentences are not mandated by statute, we must examine the record to ensure that the trial court explained its reasons for selecting the sentence imposed. Id. The trial court's statement of reasons must include: (1) the identification of all significant aggravating and mitigating circumstances; (2) the specific facts and reasons that led the court to find the existence of each such circumstance; and (3) an articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determining the sentence. Id.

Where, as here, the amended sentencing scheme applies,⁴ it is not clear whether the Ortiz rule still requires the trial court to find at least one aggravator and to include a

⁴ Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and to comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Bickerstaff

sentencing statement in its decision. For our purposes herein, however, we need not answer that question.

We will assume for argument's sake that the trial court was required, pursuant to Ortiz, to find at least one aggravator to support its order of consecutive sentences. It did not do so. This purported error, however, is harmless if Bickerstaff suffered no prejudice as a result.

Our review of the record reveals that Bickerstaff has a substantial criminal history that dates back to 1994. He has amassed convictions for misdemeanor assault and battery, class A misdemeanor criminal conversion, two counts of class A misdemeanor driving while suspended, two counts of class D felony theft, class D felony attempted theft, and class A misdemeanor invasion of privacy. P.S.I. p. 102-04. He also had one of his sentences extended by six months for lying on an affidavit and has violated probation on a number of

committed his criminal offense before this statute took effect but was sentenced after the effective date. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

While our Supreme Court has not explicitly ruled which sentencing scheme applies in these situations, a recent decision seems to indicate the date of sentencing to be critical. Prickett v. State, 856 N.E.2d 1203 (Ind. 2006). The defendant in Prickett committed the crimes and was sentenced before the amendment date. In a footnote, our Supreme Court stated that “[w]e apply the version of the statute in effect at the time of Prickett’s sentence and thus refer to his ‘presumptive’ sentence, rather than an ‘advisory’ sentence.” Id. at *3 n.3 (emphasis added). Therefore, since Bickerstaff was sentenced over one year after the effective date of the amended statute, we will apply the amended sentencing scheme herein.

different occasions. Id. at 103. Bickerstaff's criminal history alone, in an absence of any mitigators,⁵ is a sufficient aggravator to support consecutive sentences.

We also note that the instant offenses are part of a multi-month, multi-county crime spree involving multiple victims across the State. It is apparent that the trial court did not abuse its discretion in concluding that Bickerstaff should not have the benefit of the time he served for the crimes he committed in Lake and Jasper Counties as he serves his sentences for the Porter County offenses. We conclude, therefore, that even if the trial court erred in failing to find an aggravating factor, the error was harmless, inasmuch as Bickerstaff's criminal history alone is sufficient to support consecutive sentences.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J, concur.

⁵ Bickerstaff does not argue that the trial court should have found any mitigating circumstances.